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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KEVIN RILEY, Defendant and Appellant.	A132151 (Contra Costa County Super. Ct. No. 51102276)

Defendant Kevin Riley appeals from his conviction on two counts of performing a lewd or lascivious act upon a 14-year-old child, Jane Doe. Relying largely on federal case law, defendant argues the trial court erred by instructing the jury with CALCRIM No. 362, regarding consciousness of guilt. The instruction, he claims, was purportedly confusing and unsupported by a proper evidentiary basis. It improperly steered the jury towards viewing as false defendant's pretrial statements that he committed only one improper act. We conclude there was a proper evidentiary basis for the instruction under California law. Therefore, we affirm the judgment.

BACKGROUND

In February 2011, the Contra Costa County District Attorney filed an information charging defendant with two counts of touching a child 14 to 15 years old in a lewd or lascivious manner, in violation of Penal Code section 288, subdivision (c)(1). A trial followed.

Jane Doe's Testimony

Jane Doe testified at trial. She said two incidents of inappropriate touching occurred when she was 14 years old and living with her mother, and defendant, who was her mother's boyfriend. On the first occasion, during Christmas break of 2009, she was alone in the home with defendant, sitting on the floor in the bedroom defendant shared with mother downloading movies on a computer. Defendant entered the room and sat behind her. Doe said defendant "put his hands down my pants and in my underwear," and indicated he was moving his hands up and down. Defendant touched her vagina, which, Doe guessed, lasted for "[l]ike 2, 3 minutes," until Doe was able to get up and leave the room.

Doe testified that the second incident occurred towards the end of December 2009 or beginning of January 2010. Doe was sitting on the front part of a two-part chair that had no back as she worked on a computer in the living room. Doe asked defendant for help downloading something, and he took a seat behind her on the second part of the chair. At first, he helped her, moving his arms around her to type. Then, Doe said, defendant "put [his hands] down my pants like the first time." Once again, defendant "[m]oved [his hands] up and down," touching Doe's vagina. He also told her to "spread her legs." Doe asked why and defendant said, "Just do it." When she asked him why a second time, he stopped. He stood up, put his fingers to his nose, and went to the bathroom for about 10 minutes.

Doe did not tell her mother about the incidents because she knew her mother loved defendant and did not want to "take that away"; it was also hard to tell her mother because defendant financially supported the family. She later told some cousins, one of whom, with their grandmother, reported the information to the police.

Detective Freier's Testimony

Detective Diane Freier of the Antioch Police Department testified that during her investigation of the case, mother called her and arranged for defendant and herself to meet with Freier at the police station. At the meeting, mother told Freier defendant had told her of two separate incidents between him and Doe. Defendant had told mother that

"he had put both of his hands down [Doe's] pants" in the first incident. However, he had said he and Doe had been "horseplaying" only in the second incident. "[Doe] had touched his private area with her foot, he told her to stop it, but they continued horseplaying, and at one point [Doe] sat directly on his face, and at one point he laid on top of [Doe's] body." Defendant, who had been instructed by Freier to speak up if mother misstated anything he had told her, did not interrupt mother or correct anything she reported.

Freier further testified that she and defendant then went into another interview room to speak privately. There, defendant recounted the incidents that had taken place between him and Doe in a manner consistent with mother's report, but offering a lot more detail. After defendant gave his account, Freier asked him if he wanted to apologize to Doe. When defendant replied that he did, Freier left him alone in the room to write an apology.

At trial, Freier read defendant's letter to the jury. Defendant wrote, " 'I have violated you in a major way,' " expressed his desire to take back " '[t]he times that I violated you,' " referred to the " 'bad decisions' " he had made, and stated that he was " 'taking responsibility for my actions against you.' "

Freier's testimony also indicated that she arrested defendant.

Mother's Testimony

Mother testified for the defense. She said after the police informed her about the allegations against defendant, she discussed them with Jane Doe, who told her what had happened. Mother took particular note of Doe's account that defendant put his fingers to his nose after touching her vagina because he did the same thing with mother.

In early September 2010, Doe was sent to live elsewhere so defendant could return to the house. Mother then discussed Doe's allegations virtually "all of the time" with defendant for the next two weeks. In response to defense counsel's questions regarding whether defendant denied, "[f]or days," "what [the prosecutor] has told you is the truth," mother acknowledged that defendant "denied it." However, he eventually told her there

had been one incident. They decided to go to the police, and mother subsequently reported what defendant had told her.

The jury found defendant guilty on both counts. The court sentenced him to two years for the second count, with a concurrent two-year term for the first. Defendant filed a timely notice of appeal.

DISCUSSION

Defendant argues the trial court erred by instructing the jury with CALCRIM No. 362, regarding consciousness of guilt, because the instruction was "confusing and, unsupported by the proper evidentiary basis, it steered the jury towards viewing as false [defendant's] statement that he committed only one molestation." Defendant claims the biased instruction violated his state and federal constitutional rights to due process, a fair trial, and a presumption of innocence, but provides no authority to support these specific constitutional claims. We conclude that, under California law, the instruction was properly supported by evidence, given defendant's pretrial inconsistent statements. Therefore, we affirm.

A. *The Proceedings Below*

The trial court's jury instruction pursuant to CALCRIM No. 362 provided, "If the defendant made a false or misleading statement before this trial relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."

Defense counsel objected on the ground that "denial of the criminal conduct in the case is not a falsehood," and that there was "no other way for a person to defend themselves other than to deny criminal culpability . . . ." The court overruled these objections.

B. *The Applicable Legal Standard*

Defendant argues the CALCRIM No.362 instruction was improper in light of the evidence based almost entirely on *United States v. Littlefield* (1st Cir. 1988) 840 F.2d 143 (*Littlefield*). The *Littlefield* court considered a "consciousness of guilt" instruction to the jury "that it may consider the circumstantial evidence indicating consciousness of guilt, in light of all other evidence in the case, in determining whether the defendant is guilty." (*Id*. at p. 148.) The court concluded that the instruction "should not be given when . . . the jury could find the exculpatory statement at issue to be false only if it already believed evidence directly establishing the defendant's guilt." (*Id*. at p. 149.) To avoid this confusing and "circular" thinking, whereby the jury must first conclude a defendant is guilty in order to find his or her statement to be false and, thus, find evidence of a consciousness of guilt, the court concluded the instruction should only be given when the purportedly false statement is about a collateral matter or is "so incredible that its very implausibility suggests that it was created to conceal guilt." (*Ibid*.) The *Littlefield* court held the trial court erred by giving the instruction because it was confusing and encouraged circular thinking under the facts and circumstances of the case (in which defendant's statements could only be found misleading based on expert testimony at trial directly establishing his guilt), but that the error was harmless. (*Id*. at pp. 148-150.)

Defendant, applying the *Littlefield* analysis, argues the trial court in effect instructed the jury to engage in improper circular thinking. He contends the jury had to first conclude he twice molested Doe, based on Doe's testimony, in order to conclude that he falsely said that he engaged in one instance of inappropriate touching and one instance of horseplay. Furthermore, he contends, his pretrial statements were not incredible nor implausible. Therefore, he concludes, the trial court's CALCRIM No. 362 instruction was improperly "biased toward a finding of guilt."

As the parties acknowledge, only one California appellate court has considered the *Littlefield* analysis without adopting it. (*People v. Wimberly* (1992) 5 Cal.App.4th 773, 796, fn. 18.) As defendant concedes by his citation to *Bank of Italy etc. Assn. v. Bentley* (1933) 217 Cal. 644, "the holding of the federal court, although entitled to respect and

careful consideration, would not be binding or conclusive on the courts of this state." (*Id.* at p. 653.) Furthermore, *Littlefield* itself indicates the federal circuit courts are not in agreement on what evidence justifies giving the "consciousness of guilt" instruction, with at least one other court taking a broader view than that stated in *Littlefield*. (*Littlefield, supra,* 840 F.2d at p. 149, citing *United States v. McDougald* (4th Cir. 1981) 650 F.2d 532, 533 ["[w]hile general denials of guilt later contradicted are not considered exculpatory statements, any other exculpatory statement which is contradicted by evidence at trial justifies the giving of [the consciousness of guilt] instruction"].)

In any event, we do not apply the *Littlefield* analysis here because under well-settled California law, a "consciousness of guilt" instruction like CALCRIM No. 362 is proper if it is supported by evidence of false or misleading pretrial statements. As the People note, although our Supreme Court has not ruled on when it is appropriate to instruct pursuant to CALCRIM No. 362, it did consider when to give the predecessor instruction, CALJIC No. 2.03, which contained very similar language. (See *People v. McGowan* (2008) 160 Cal.App.4th 1099, 1103 (*McGowan*) [discussing the instructions' similarity in determining the trial court did not improperly instruct with CALCRIM No. 362].)[1] In *McGowan*, the Third District concluded that CALCRIM No. 362 was not an improper pinpoint instruction highlighting particular evidence because, like CALJIC No. 2.03, it warns the jury that a defendant's false or misleading pre-trial statement cannot alone establish guilt.[2] (*McGowan,* at pp. 1103-1104.) In light of the similarities between CALJIC 2.03 and the CALCRIM No. 362 instruction given in the present case (which similarly warned that "evidence that the defendant made such a statement cannot prove

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[1] CALJIC No. 2.03 provided, " 'If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crime or crimes for which he is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.' " (*McGowan, supra,* 160 Cal.App.4th at p. 1103.)

[2] Notably, the *Littlefield* court, in discussing the "consciousness of guilt" instruction before it, made no reference to such a warning, thereby indicating it either was not present in the instruction or was not considered by the *Littlefield* court.

guilt by itself," we, like the *McGowan* court, also turn to Supreme Court authority addressing CALJIC No. 2.03 to resolve questions involving CALCRIM No. 362.

The Supreme Court has determined that "CALJIC No. 2.03 is properly given when there exists evidence that a defendant made a false or deliberately misleading or false statement to explain his or her conduct." (*People v. Russell* (2010) 50 Cal.4th 1228, 1254 [a case not discussed by either party], citing *People v. Page* (2008) 44 Cal.4th 1, 50-51; see also *People v. Stitely* (2005) 35 Cal.4th 514, 555 [CALJIC No. 2.03 "applied based on defendant's inconsistent and contradicted statements to police attempting to minimize involvement" in the crime]; *People v. Kelly* (1992) 1 Cal.4th 495, 531 [evidence of defendant's false statement to police supported the giving of the instruction].) The false or misleading nature of a defendant's statement before trial may be established by his other inconsistent pretrial statements. (See *People v. Russell*, *supra*, at pp. 1254-1255.) As indicated by the People, the false nature of a defendant's statement may be shown by such things as the inconsistencies in a defendant's statements. (*People v. Kimble* (1988) 44 Cal.3d 480, 498.) "[F]alse statements made by a defendant at the time of arrest are admissible . . . to show consciousness of guilt." (*Id.* at p. 496.) In our view, these same rules apply regarding the giving of the CALCRIM No. 362 instruction.

Defendant argues that California courts have nonetheless ruled consistent with, or in a way that does not foreclose the application of, the *Littlefield* analysis. He contends, for example, that the defendant in *People v. Stitely*, *supra*, 35 Cal.4th 514 made "implausible" statements and that the court in *People v. Kelly*, *supra*, 1 Cal.4th 495, did not consider the "implausibility" he raises. This ignores the fact that the analyses in *Stitely* and *Kelly* focused entirely on the inconsistent nature of defendant's statements without regard for their credibility. (*Stitely*, at p. 555; *Kelly*, at p. 531.)[3] In any event,

[3] Defendant also argues that, to the extent *Kelly* addressed his claim, it is wrong because "there is no need for an instruction highlighting the defendant's false statements and telling the jury not to rely on them exclusively in reaching a verdict" and, even if there were, "there is no justification for singling out the defendant's prior statements as false, while omitting an instruction that the jury should not exclusively rely on the false

California courts have found inconsistent statements to be a proper basis for giving the "consciousness of guilt" instruction that can hardly be considered implausible, such as in *People v. McGowan*, *supra*, 160 Cal.App.4th at pages 1102-1104 (defendant first told police he had not been alone with the victim, who had been at his house, but not inside, and later admitting that he had been alone with her and she had been in his house) and *People v. Russell*, *supra*, 50 Cal.4th at pages 1253, 1254-1255. (Defendant denied to police that he had said he planned to "shoot" officers, but the next day said it was " 'very possible' " he had said " ' "The cops are comin', I don't care, I'll take them out too." ' ") Defendant's arguments for why *Littlefield's* analysis should apply here are unpersuasive.

C. *Evidence Supported Giving the CALCRIM No. 362 Instruction*

As the People indicate, evidence was presented at trial from which the jury could rationally conclude defendant made one or more deliberately misleading or false statements to explain his conduct. This evidence justified the court giving the CALCRIM No. 362 instruction.

According to Freier's testimony, mother reported to her that defendant said, and defendant separately told Freier, that defendant once "put both of his hands down [Doe's] pants" and once engaged in just "horseplay" with Doe. Thus, there was evidence that defendant told mother[4] and Freier that he had inappropriately touched Doe on only one occasion. Yet, in his written apology to Doe, written the same day mother and he spoke with Freier, defendant wrote that he wished he could take back " 'the *times* that I violated you,' " referred to " 'bad *decisions*' " he had made, and indicated he was taking responsibility for his " '*actions*.' " (Italics added.) Defendant's repeated use of the plural in his apology letter suggests he "violated" Doe multiple times, and is, therefore, inconsistent with his previous statements to mother and Freier. These inconsistencies

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statements of any other witness." These arguments, presented without citation to legal authority, are unpersuasive.

[4] Our own research indicates that pretrial statements by a defendant that support the giving of the "consciousness of guilt" instruction are not limited to those made to law enforcement. (See *People v. Arias* (1996) 13 Cal.4th 92, 141-142 [defendant's pretrial statement to his mother was a proper basis for giving CALJIC No. 2.03].)

justified giving the CALCRIM No. 362 instruction. (See *People v. Russell*, *supra*, 50 Cal.4th at p. 1254 [CALJIC No. 2.03 properly given in light of the inconsistency between defendant's initial denial to police of improper conduct and his equivocation to police the next day], *People v. Stitely*, *supra*, 35 Cal.4th at p. 555 [CALJIC No. 2.03 properly given in light of defendant's inconsistent and contradicted statements to police], and *People v. McGowan*, *supra*, 160 Cal.App.4th at pp. 1103-1104 [CALCRIM No. 3.62 properly given in light of defendant's inconsistent statements to police].)[5]

Although the *Littlefield* analysis is not California law, we also note that, under the facts and circumstances of the present case, the CALCRIM No. 362 instruction did not necessarily require the jury to engage in the kind of circular thinking criticized in *Littlefield*. Unlike the *Littlefield* jury, which could only have found Littlefield to have made misleading statements based on expert testimony at trial directly establishing his guilt (*Littlefield*, *supra*, 840 F.2d at pp. 148-149), here, the jury did not have to believe Doe's testimony or find defendant guilty to conclude defendant had made a false or misleading pretrial statement. It could rationally consider defendant's use of the plural in his apology letter as indicating he told false or misleading statements to mother and Freier about touching Doe inappropriately on only one occasion and engaging in "horseplay" on a second occasion. It did not necessarily have to conclude his apology letter referred to the specific incidents testified to by Doe or to incidents that necessarily met the elements of a crime under Penal Code section 288.5. Furthermore, as we have indicated, the jury was warned that it could not rely on such a false or misleading statement as evidence of guilt by itself, and we presume the jury followed this instruction. (*People v. Cain* (1995) 10 Cal.4th 1, 34 [regarding the similar warning in CALJIC No. 2.03].)

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[5] The discussion in the People's brief suggests defendant's initial denials to mother, as compared to his subsequent statements, were also a proper evidentiary basis for the trial court's CALCRIM No. 362 instruction. In light of the sparse testimony by mother about what defendant denied and our conclusion that other pretrial statements by defendant justified giving the instruction, we do not need to, and do not, reach this issue.

In short, the court did not err by instructing the jury pursuant to CALCRIM No. 362. In light of our conclusion, we have no need to, and do not, address defendant's claim that the error was prejudicial.

DISPOSITION

The judgment is affirmed.

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Lambden, J.

We concur:

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Haerle, Acting P.J.

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Richman, J.